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however, and the idea of an action *in rem* against the machine seems also desirable because only such an enactment would adequately solve the problem of liability in the case of the family automobile. But to allow such an action is not without difficulties. A statute, imposing a liability on an owner of a motor vehicle for negligence in its operation by any person except a thief, was passed in Michigan.<sup>8</sup> This was held unconstitutional under the due process clause of the Fourteenth Amendment to the Constitution, on the ground that it is unconstitutional *per se* to impose liability upon one who is without fault or negligence.<sup>9</sup> The better view, however, is that imposition of absolute liability is not unconstitutional except where the regulation is unreasonable in view of the ends to be attained.<sup>10</sup> In the case of automobile ownership it seems well within the power of the legislature to impose a liability to the extent of the value of the machine in all cases where any acquiescence on the owner's part can possibly be found. Even this would leave the practical problem of the court crowded with negligence cases and it has been suggested that it would be desirable to work out some scheme of absolute liability regardless of fault in which the burden would be evenly divided by means of insurance.<sup>11</sup> This, however, seems a bit drastic and not wholly in accord with present-day theories.

In the absence of statutory enactment, however, the second solution seems acceptable; that is, where the court stretches the rather elastic doctrine of agency so as to include ordinary automobile driving within the scope of authority of any member of the family. In *Birch v. Abercrombie*<sup>12</sup> the court held that since the automobile was being used for one of the very purposes for which the owner intended it should be used, to wit, the pleasure of the family, it was being used by the agent of the owner acting within the scope of his authority. This has been followed by a great number of courts<sup>13</sup> and it is to be regretted that California is not among them. *M. M.*

**PUBLIC SERVICE COMMISSIONS: JURISDICTION OF RAILROAD COMMISSION OVER EXTRA TERRITORIAL OPERATION OF MUNICIPAL PLANT**—A field of public service of increasing importance was removed from the purview of state supervision in *City of Pasadena v. Railroad Commission*<sup>1</sup> in which case it was held that the commission had no jurisdiction over an electric plant owned by a municipality even when engaged in serving a separate city outside its borders. The opinion interpreted literally Article 12, section 23,

<sup>8</sup> *Dougherty v. Thomas* (1913) 174 Mich. 371, 140 N. W. 615.

<sup>10</sup> *St. Louis R. R. v. Mathews* (1896) 165 U. S. 1, 41 L. Ed. 611, 17 Sup. Ct. Rep. 243; 12 Michigan Law Review, 321.

<sup>11</sup> 8 California Law Review, 269; 15 Illinois Law Review, 369.

<sup>12</sup> *Birch v. Abercrombie* (1913) 74 Wash. 486, 133 Pac. 1020.

<sup>13</sup> *Davis v. Littlefield* (1914) 97 S. C. 171, 81 S. E. 487; *Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091; *Smith v. Jordan* (1912) 211 Mass. 269; 97 N. E. 761; 29 Yale Law Journal, 467; 2 Virginia Law Review, 189.

<sup>1</sup> (Aug. 12, 1920) 60 Cal. Dec. 202, 192 Pac. 25.

of the state constitution, holding that in the definition there laid down,<sup>2</sup> the use of the words "private corporation" absolutely precludes the legislature from vesting in the Railroad Commission any control whatever over a municipal plant. Although recognizing the distinction between the governmental and proprietary capacity of a municipality, it was not conceded that a city becomes a private corporation within the above section when performing public service. The court was unimpressed with the argument that such authority might be claimed through the clause in section 22 of Article 12 of the constitution which gives the legislature power to confer additional powers upon the commission,<sup>3</sup> holding that these additional powers must be germane to the purpose for which the commission was created,<sup>4</sup> that is to say, the control of "public utilities" as defined in the constitution. The court refused to rule that the definition of "electrical corporations" in the Public Utilities Act<sup>5</sup> as "any corporation or person . . . owning, controlling or operating any electric plant" included anything more than private companies in the absence of any specific mention of municipal corporations.

The decision, though logical enough as a matter of abstract reasoning, seems extremely technical. Maybe it is true that a municipality does not actually become a private corporation when it conducts a public utility business, but much authority can be marshalled in support of the proposition that in so doing it acts in the capacity of a private corporation, subject in general to the same obligations and enjoying the same rights.<sup>6</sup> Certainly this ought to be so in so far as extramunicipal service is concerned.

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<sup>2</sup> "Every private corporation and every individual or association of individuals, owning, operating, managing or controlling any commercial railroad" (and various other specified utilities) "is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be prescribed by the Legislature."

<sup>3</sup> "No provision of the Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is hereby expressly declared to be plenary and unlimited by any provision of this Constitution."

<sup>4</sup> Citing *Pacific, etc. Co. v. Eshleman* (1913) 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N.S.) 652, Ann. Cas. 1915C 822; commented upon in 2 *California Law Review*, 225.

<sup>5</sup> Cal. Stats. 1911, Ex. Sess. ch. 14, p. 18; amended Cal. Stats. 1913, ch. 553, p. 934; Second Public Utilities Act: Cal. Stats. 1915, ch. 91, p. 115; amended Cal. Stats. 1917, ch. 707, p. 1329, ch. 137, p. 199, ch. 209, p. 320, ch. 176, p. 261, ch. 120, p. 168; Cal. Stats. 1919, ch. 304, p. 489; and see especially § 1, subdiv. (r).

<sup>6</sup> 3 *Dillon, Municipal Corporations* (5th ed.) § 1303; 1 *Wyman on Public Service Corporations*, p. 187; *South Pasadena v. Pasadena Land etc. Co.* (1908) 152 Cal. 579, 93 Pac. 490; *Nourse v. City of Los Angeles* (1914) 25 Cal. App. 384, 143 Pac. 801, and 3 *California Law Review*, 80, note; *Omaha Water Co. v. Omaha* (1906) 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N.S.) 736; *South Carolina v. U. S.* (1905) 199 U. S. 437, 50 L. Ed. 261, 26 Sup. Ct. Rep. 110; *State ex rel. W. J. Armstrong Co. v. Waseca* (1913) 122 Minn. 348, 142 N. W. 319, 46 L. R. A. (N. S.) 437.

Again, the "additional powers" clause mentioned above<sup>7</sup> cannot be reasonably interpreted otherwise than as allowing the legislature to give the commission control over municipal utilities if it saw fit so to do. Conceding that these additional powers must be germane to the subject of public utilities, if the legislature brought municipally owned service under the commission's control, it would merely enlarge the definition of the term "public utility"—an exercise of power which would seem to be germane to the subject. Moreover, it is entirely reasonable to hold that "any corporation or person" in the Public Utilities Act includes municipal plants and in fact the state Supreme Court has so interpreted these words in a former provision of the state constitution.<sup>8</sup>

Even granting, however, that the principal case is legally unimpeachable, the desirability of the policy it establishes is at least debatable. The general question of the jurisdiction of a public utility commission over municipal plants is ordinarily a matter of express statutory provision; a number of states include municipal corporations in express terms within the commission's control,<sup>9</sup> others specifically exempt them.<sup>10</sup> Interpretation becomes more difficult, of course, when the statute, like that in California, is couched in general terms without express inclusion or exception of municipal plants. Inasmuch as the fundamental purpose of a public utility commission is to secure uniformity in rates and regulations throughout the entire field, and to substitute for unrestrained and wasteful competition properly regulated control,<sup>11</sup> it seems clear that the better policy is to make no such exception.

But even if the state is committed to "municipal home rule" on this matter, that should not deprive the commission of jurisdiction over the extraterritorial operations of municipally owned plants, and indeed such is the rule in at least two jurisdictions where cities operating utilities within their own borders are exempt from

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<sup>7</sup> *Supra*, n. 3.

<sup>8</sup> *South Pasadena v. Pasadena Land etc. Co.*, *supra*, n. 6, at p. 594, holding that § 19 of Art. XI of the state constitution, providing that "any individual or corporation duly incorporated for such purpose" might lay mains in the streets for supplying water, empowered a city to act as such a "corporation duly incorporated for such purpose."

<sup>9</sup> For example: *Montana*, ch. 52, Laws, 1913; *Public Service Commission v. Helena* (1916) 52 Mont. 527, 159 Pac. 24, P. U. R. 1916F 389; *Missouri: U. S. Cooperage Co. v. Malden*, P. U. R. 1919E 49, holding a municipally owned electric plant a public utility under §§ 68, 69, 70 and 71 of the Missouri statute, Laws, 1913, p. 610; *West Virginia: Ch. 15 (O) Code, Mill Creek Coal, etc. Co. v. Public Service Commission* (1919) 100 S. E. 557, P. U. R. 1920A 704, 7 A. L. R. 1081; *Maine: Laws, 1913*, ch. 129, § 7.

<sup>10</sup> Among which are the following states: *Idaho: Re Mackay Light and Power Co.*, P. U. R. 1919E 482, citing Session Laws, 1917, ch. 128, subdiv. c; *Alabama: General Acts, 1915*, p. 865; *Oregon: Gates v. Public Service Commission* (1917) 86 Ore. 442, 167 Pac. 791; *Illinois: Chicago v. O'Connell* (1917) 278 Ill. 591, 116 N. E. 210.

<sup>11</sup> See a valuable note in 33 *Harvard Law Review*, 576.

commission control.<sup>12</sup> A municipality has no governmental power outside of its own limits. It could not grant a franchise to a private company to serve another city, and it is hard to see why a city performing such service itself should not be amenable to state supervision.<sup>13</sup> The holding to the contrary places the inhabitants of the outside city in an unenviable situation. They have no voice as voters or taxpayers in the shaping of the affairs of the municipality engaged in the business, and to deny the power of the commission to intervene is apparently to leave these consumers and indeed any private company in the field also, at the mercy of the other city. What possible objection there is to state control over this field of public service is not apparent. Granting that the constitution prevents the commission from exercising the power, it would seem then, to follow that there is need for an amendment conferring upon the commission jurisdiction over utilities owned by municipalities, at least in their service outside their own borders.

H. A. B.

SALES: ARCHAISM OF PRESENT RULE GOVERNING FORECLOSURE OF VENDOR'S LIEN—In *Madison v. Weyl-Zuckerman and Com-*

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<sup>12</sup> Colorado, where local service of a public utility within a municipality is exempt from commission control, City and County of Denver v. Mountain States, etc. Co. (1919) 184 Pac. 604, P. U. R. 1920A 238, treats a municipal plant operating outside the city as any other public utility and subject to the regulation of the commission. Star Investment Co. v. City and County of Denver, P. U. R. 1920B 684.

In Arizona, where the constitution provides that corporations other than municipal are subject to the commission's control, the intramunicipal business of a city-owned plant is exempt. Re South Side Gas and Electric Co., P. U. R. 1918A 493. However, a municipal plant serving an adjoining city is within the commission's jurisdiction, as it then operates as a private company. Harber v. Phoenix, P. U. R. 1918D 352, holding that the constitutional exemption of municipal corporations applied only to cities within their own limits. It is true that these are merely holdings of the commissions, but they have never been overturned and represent the practice and statutory interpretation in those states. This was also the view in California prior to the principal case. See In re Application of San Diego (1914) 4 Cal. R. Com. Dec. 902, also the holding of the Railroad Commission in granting the order that was annulled by the case under discussion, *sub nom.* Pacific Light etc. Co. v. City of Pasadena, P. U. R. 1920A 149. In New Jersey also the approval of the commission is required to enable a municipality to serve adjoining cities. In re Borough of South River, P. U. R. 1920E 408.

<sup>13</sup> The state constitution under § 19 of Art. XI authorizes a municipal utility to serve outside its borders. This section as it formerly read gave municipalities the right to fix rates within their own limits for public utilities operating therein. It was held in the South Pasadena case, *supra*, n. 6, that the power of the city being served was paramount to that of the other municipality engaged in the public service. The rate regulating powers of municipal corporations over "public utilities" were taken away in 1914, when Art. XII, § 23 was amended. The principal case says by way of dictum that municipal corporations were not supposed to be embraced in the term "public utility", admitting that it is not clear which one of the two cities has the right to fix rates for outside service. It is submitted that the Railroad Commission is the logical agency for that purpose.